NO. 41630-1-II

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

ANTHONY J. REEK,

Appellant.

APPELLANT'S BRIEF

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Assignments of Error

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2. The trial court erred when it failed to enter written findings of fact and conclusions of law after conducting a Cr R 3.5 hearing.

3. The trial court erred when it declined to give defendant's proposed instruction based on WPIC 6.41.

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7. There was not sufficient evidence of two counts of Bail Jumping in violation of the due process clause of the Fourteenth Amendment.

8. The defendant was denied due process of law based on prosecutorial misconduct of vindictive charging.

9. The defendant was denied due process of law in violation of the Fourteenth Amendment based on the cumulative error doctrine.

Issues Pertaining to Assignments of Error

1. Whether the trial court erred when it denied the defendant's motion to suppress the evidence because the defendant's statements were not voluntarily, intelligently or knowing made because he was under the influence of drugs? (Assignment of Error 1.)

2. Whether the trial court erred when it did not enter written findings of fact or conclusions of law as required by CrR 3.5? The defendant testified at the CrR 3.5 hearing. He denied that he stated to the arresting officer that he intended to defraud Wal-Mart. (Assignment of Error 2).

3. Whether the trial court erred when it declined to give the defendant's proposed instruction based on WPIC 6.41? The defendant was alleged to have stated that he intended to defraud Wal-Mart to a police officer after he was placed under arrest. This statement-which the defendant denied- became a material and significant part of the evidence for the prosecution allowing them to obtain multiple convictions for crimes committed on August 17, 2009. (Assignment of Error 3.)

4. Whether the trial court erred as a matter of law when it did not allow the defendant an opportunity to except to granting the plaintiff's instructions or to except to declining to give the defendant's proposed instruction before it assembled the trial court's instructions to the jury? (Assignment of Error 4).

5. Whether the trial court erred when it denied the defendant's half time motion to dismiss counts I and II , which alleged Burglary in the Second Degree, where the alleged victim was the Wal-Mart corporation and where the building that the defendant entered was occupied by Wal-Mart? (Assignment of Error 5).

6. Whether the defendant was denied effective assistance of counsel when his attorney did not object to the introduction of an exhibit-showing that the defendant had been previously trespassed from Wal-Mart stores-during trial and did not present any mitigating evidence on the defendant's behalf at sentencing? (Assignment of Error 6).

7. Whether there was sufficient evidence of two bail jumping charges where the prosecutor did not prove that the defendant had personal notice and knew of forthcoming hearings, other than showing that he was present at the hearings when the notices were given? (Assignment of error 7.)

8. Whether the prosecutor acted vindictively by adding at least six additional charges following the defendant's exercise of his right to trial? The prosecutor originally filed a two count information. By the time of trial the prosecutor filed an eleven count information, including three counts of Bail Jumping. (Assignment of error 8.)

9 Whether this court should grant the defendant a new trial based on the cumulative error doctrine because there have been several errors, none

of which standing alone may require reversal, but when they are combined may deny an accused a fair trial? (Assignment of error 9.)

B. Statement of the Case

Anthony James Reek was convicted of ten counts out of eleven charged counts. CP 262-3. He was convicted of three counts of Criminal Trespass in the First Degree contrary to RCW 9A.52.070, one of which was a lesser included crime for Burglary in the Second degree; one count of Burglary in the second degree contrary to RCW 9A.52.030, which had a standard range sentence of 51 to 68 months; two counts of forgery in violation of RCW 9A.60.020; two counts of Making a false or Misleading Statement to a Public Servant contrary to RCW 9A. 76.175 and two counts of Bail Jumping contrary to RCW 9A.746.170.3, which had standard range sentences of 51 to 60 months. CP 261-62..

Prior to trial the court denied Mr. Reek's pro se *Marsden*[1] motion to substitute new appointed counsel. 8/30/10 RP 7-10. At a later hearing this attorney was allowed to withdraw because of a conflict about

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[1] *People v. Marsden,* 2 Cal.3d 118, 123-26, 465 P.2d 44, 47-8. (1970). This is a request by a criminal defendant to discharge their lawyer on the basis of being incompetent or inadequately represented. A defendant seeking to discharge his appointed counsel must establish either that appointed counsel is not providing adequate representation or that the defendant and counsel have become embroiled in such an irreconcilable conflict that ineffective representation is likely to result.

the defendant's failure to appear for trial on September 7, 2010. New counsel was appointed. 9/13/00 RP 12. During trial the trial court denied the defense's half- time motion to dismiss the two counts of burglary in the second degree. II RP 168-171.

Trial Testimony

Phillip A. Grimes testified that he was the asset protection coordinator with Walmart at their Poulsbo, Washington store. RP 58. He identified exhibits 1 and 2 as Walmart trespass notices issued to the defendant Anthony J. Reek. RP 61-64. He testified that when trespass notices are issued the offending person is advised that they may not return to the store. RP 65.

Grimes identified exhibit 17 as a photograph of video surveillance taken on August 5, 2009. RP 65. Exhibit 21 was a receipt dated 8/5/09. RP 66. The receipt showed refund of a family tent. Id. The identification on the receipt was FARISDM164LE. RP 67. The receipt matched the transaction that was shown in exhibit 17. Id. Grimes identified one of two people in the photograph as the defendant. Id.[2]

Grimes went on to identify exhibit 18 as another photograph taken on August 17, 2009 at one of Walmart's service desks. RP 70. The

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[2] The jury was then shown a video of the August 5, 2009 transaction. The defendant was identified in the video by Grimes. RP 69.

transaction depicted a Coleman tent that was being refunded. Id. The Washington identification was CLINTNL384NG. Id. The person shown in the picture taken from the video was identified as the defendant. RP 71.

Grimes went on to identify exhibit 19 relating to August 17th. RP 72. The exhibit depicted a transaction at a store register. Exhibit 23 was a receipt that correlated to the picture on the video. RP 73. This transaction entailed a purchase and an attempt to refund two faucets. Id. The transaction was cancelled by the clerk and Mr. Reek kept the two faucets.

Exhibit 20 was identified as a transaction that occurred later on the same day at 12:55. RP 76. It showed Mr. Reek at the customer service desk with the same faucets depicted in exhibit 19 and 23. At that time Mr. Grimes was consulted by the supervisor about the return of the items. According to Grimes, it appeared that Mr. Reek was watching him. And then Mr. Reek left the building without the faucets. RP 78. Grimes followed Reek out of the building and into the parking lot where Reek left in his vehicle. RP 79.

Grimes identified exhibit 24 as identification that Mr. Reek left at the store. The first five letters of that document were GARCIA. RP 80. Later he was dispatched to a stopped vehicle in Poulsbo, Washington. There he identified the driver as Mr. Reek. RP 81.

Nick Hoke testified that he was a City of Poulsbo police officer

who was on patrol duty on August 17, 2009. RP 87. He was dispatched to an incident at WalMart where someone at the customer service desk was, "attempting to do a transaction that was fraudulent in nature." RP 88. As Hoke approached WalMart he saw a car coming out of the store's parking lot that matched the description of the vehicle he was given.

The driver was stopped and verbally identified himself as Brian Patrick Reek with a date if birth of 5/21/1965.[3] RP 87-90. Shortly, Philip Grimes arrived and showed Mr. Hoke an identification card that the person left behind at Walmart. RP 91; ex. 24. The officer identified Mr. Reek's picture on the exhibit but with a different name. id. Mr. Hoke testified that Mr. Reek admitted that was the card that he left at Walmart when he was attempting to return merchandise. RP 92.

Hoke testified and identified exhibit 25 as blue folder containing paper work that he retrieved from Mr. Reek's vehicle. Id. RP 92. The exhibit contained white and green paper consisting of "...a literal cut and pasting of different identification/names." RP 93. Each of which contained a picture of Mr. Reek with two different names. RP 93.

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[3] The prosecutor charged this misdemeanor offense as Count VIII, Making a False or Misleading Statement to a Public Servant. RCW 9A.76.175; CP 72. Another count of Making a False or Misleading Statement to a Public Servant on May 10, 2010 was also charged as Count IX. CP 72.

Mr. Reek was found guilty of ten of eleven counts charged and except Count I where he was found guilty of criminal trespass in the first degree as a lesser included crime of Burglary in the Second degree. CP 173. He was sentenced to 68 months for count II, sixty months for counts V and VI, 29 months for counts III and IV and 365 days for counts I, VIII, IX, X and XI. CP 263-4. All counts ran concurrently. CP 264, 273. A notice of appeal was filed on December 21, 2010. CP 274.

C. Argument

I. THE TRIAL COURT ERRED WHEN IT DENIED THE DEFENDANT'S MOTION TO SUPPRESS THE EVIDENCE.

Prior to trial the court conducted a CrR 3.5 hearing. RP 21-47. Officer Hoke testified that after he stopped Mr. Reek he was given the name of Brian Patrick Reek. RP 24. Later, Mr. Grimes from Wal-Mart appeared at the scene. RP 24. After Mr. Hoke was briefed he arrested Mr. Reek. RP 26. Mr. Reek was then advised of his rights. Id.

According to Hoke, Mr. Reek willingly told him that he had made the identification himself. The officer testified: "He admitted that he made an identification card with a different name and that he was using it to defraud the store." RP 26-7.

Contrary to this testimony, Mr. Reek testified at the hearing:

"Q. Okay. Did you speak with Officer Hoke at all on the scene?
A. The only thing I said to Mr. Hoke would have been, when

he first came to the car and said that there was something going on at Walmart, the only thing I said was "I did not steal anything." And that's all I told him.

Q. You didn't have any other conversation with Officer Hoke?

A. Nope.

Q. Okay. So after you had been read your *Miranda* [4] rights, did you exercise those rights to remain silent?

A. I went to sleep." I RP 41-2.

Mr. Reek testified essentially that the only thing he said when the officer approached his vehicle was that "I did not steal anything." RP 41. On cross-examination he testified that he was high on meth and that he was crashing from methamphetamine. RP 44. After being read his rights he said: "I was in and out, incoherent, and sleeping...." RP 44.

The trial court decided that Mr. Reek's statements were made knowingly, intelligently, and voluntarily and "that he knew the impact of his situation." RP 47.

According to *State v. Sanders,* 120 Wn.App. 800, 86 P.3d 232 (Div. II 2004) a confession is not voluntary if the totality of the circumstances indicate that the defendant did not exercise his free will or was coerced into making statements. *State v. Broadaway,* 133 Wn.2d 118, 132, 942 P.2d 363 (1997).

The standard of review for voluntariness of a confession "...is

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[4] *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct.1602, 16 L. Ed.2d 694 (1966).

whether under the totality of the circumstances, the confession was coerced." *State v. Rupe,* 101 Wn.2d 664, 678-79, 683 P.2d 571 (1984). However, inebriation is a factor that the court should consider in determining whether a defendant voluntarily waived his rights. *State v. Aten* 130 Wn.2d 640, 664, 927 P.2d 210 (1996).

The trial court found Mr. Reek's statements to be voluntary, but did not set-forth any findings of fact or conclusions of law to support the findings of fact. The trial court did not set-forth in writing the disputed facts nor any conclusions as to the disputed facts. See CrR 3.5(c) entitled "Duty of Court to Make a Record."

The defense argued that Mr. Reek's statements were not voluntary because he was under the influence of drugs, was incoherent and "wasn't aware of what was occurring." RP 46.

II. THE TRIAL COURT ERRED WHEN IT NEGLECTED TO ENTER WRITTEN FINDINGS OF FACT AND CONCLUSIONS OF LAW FOLLOWING A CrR 3.5 HEARING.

The trial court failed to enter written findings of fact and conclusions of law after conducting a CrR 3.5 hearing as required by CrR 3.5(c).[5] This was significant in this case because the defendant testified at

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[5] Findings of fact are reviewed for substantial evidence. *State v. Adams*, 138 Wn.App. 36, 46, 155 P.3d 989 (Div. III 2007). The findings must form a sufficient basis to support the conclusions of law. This review and review of issues of law is de novo. *Tacoma v. State*, 117 Wn.2d 348,

the CrR 3.5 hearing and denied that he stated that he intended to defraud Wal-Mart when he entered Wal-Mart's store. RP 41-2. The alleged admissions-of an identification card and of intending to defraud the store-became the center piece of the plaintiff's closing argument. And it provided sufficient and substantial evidence that Mr. Reek intended to enter Wal-Mart to commit a crime. This in turn supported the prosecutor's four charges stemming from August 17, 2009: two counts of Burglary in the Second Degree and two counts of forgery. CP 68-70, RP 203.

CrR 3.5 (c) states:

> "(c) Duty of Court to Make a Record. After the hearing, the court shall set forth in writing: (1) the undisputed facts; (2) the disputed facts; (3) conclusions as to the disputed facts; and (4) conclusion as to whether the statement is admissible and the reasons therefor."

These findings should have been entered before the trial began or before it reached its conclusion. Especially since the defendant was proposing WPIC 6.41 (see argument (Out of Court Statement by Defendant instruction should have been given, infra at III). Also, the trial court noted that none of the CrR3.5 testimony was consistent. RP 46-7.

According to *State v. Trout,* 125 Wn.App. 403, 105 P.3d 69, *review denied,* 155 Wn. 2d 1005 (2005):

361, 816 P.2d 7 (1991); *State v. Ford*, 125 Wn.2d 919, 923, 891 P.2d 712 (1995).

> "The criminal rules require that at the end of a "3.5 hearing" (admissibility of statement) the trial judge must set forth in writing, "(1) the undisputed facts; (2) the disputed facts; (3) conclusions as to disputed facts; and (4) conclusion as to whether the statement is admissible and the reasons therefor." CrR 3.5(c)." id. at 414-15.

This error is harmless provided that the trial court's opinion "is clear and comprehensive." id. at 415. That was not the case at bench. Entry of the CrR 3.5 findings was a critical stage of the proceedings that was omitted by the trial court. It was stated in *State v. Cunningham*, 116 Wn.App. 219, 227, 65 P.3d 325 (2003):

> " We take this opportunity to remind counsel that the timely filing of findings and conclusions after a suppression hearing is not an empty formality. It is required by the rule CrR 3.5©. Written findings and conclusions facilitate and expedite appellate review of the issues. *State v. Head*, 136 Wn.2d 619, 622-23, 964 P.2d 1187 (1998)."

(See also, *State v. Harris,* 114 Wn.2d 419, 442, 789 P.2d 60 (1990) ("To ensure proper state appellate and federal habeas corpus review of a the court's decision, the court should prepare detailed written findings of fact. *Cf.* CrR 3.5(c)")

III. THE TRIAL COURT ERRED WHEN IT DECLINED TO GIVE DEFENDANT'S PROPOSED INSTRUCTION.

The trial court declined to give defendant's proposed instruction. During objections and exceptions to instructions the following occurred:

> "THE COURT: The next one, the weight and credibility

to out-of-court statements the defendant may have made[6] Does the State have a position on that?

MS. DENNIS: Your Honor, I think the general instruction giving the jury or indicating to the jury that they're the sole weights of the credibility of witnesses and that they're the judges of the evidence, I think that that's sufficient.

THE COURT: I agree. That will not be given...."

II RP 180-1. The trial court did not ask for exceptions and so none were noted for this instruction by the defense. (See argument IV, infra.)

WPIC 6.41 States as follows:

"OUT OF COURT STATEMENTS BY DEFENDANT

You may give such weight and credibility to any alleged out-of-court statements of the defendant as you see fit. Taking into consideration the surrounding circumstances."

11 *Washington Practice* 196 (West 2008).

According to the Note on Use:

"This instruction must be given upon request of a defendant when, after a CrR 3.5 hearing, the trial court has ruled that an out of court statement is admissible and the defense has raised the issue whether the out of court statement was voluntary through evidence offered or cross-examination of witnesses."

11 *Washington Practice* 196.

Mr. Reek was severely prejudiced when WPIC 6.41 was rejected by the trial court. The state offered Mr. Reek's incriminating statements

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[6] The defendant's proposed instructions were not part of the lower court record. However, the wording referred to by the trial court indicates that the instruction referred to was WPIC 6.41.

during the trial through officer Hoke as follows:

"Q. Okay. I'm going to hand you what's been marked and admitted as State's Exhibit 24. Does that look familiar to you?
A. That's the one.
Q. That's the card that was given to you by Mr. Grimes?
A. Yes.
Q. Okay. And, obviously, I mean, are you able to see a picture, recognize a person in that picture?
A. Well, it looks like this has been handled a little bit. But it's the defendant but with a different name.
Q. This isn't the name he provided to you?
A. No. That's a different name.
Q. Okay. Did you bring that to the defendant's attention?
A. Yes.
Q. And what was his response?
A. May I look at my report briefly?
Q. Yes.
A. Okay. All right. When I showed it to him, he admitted that was the ID card that he had left behind at the store when he was trying to return the merchandise.
Q. Okay. Did you place him under arrest at that point?
A. I did.
Q. And did he admit anything further to you?
A. He did.
Q. What did he admit to you?
A. He admitted – Let me just look at this again, if I may.
Q. Sure.
A. He admitted to me that he had manufactured that ID card himself at home and it was his intent to defraud the store." I RP 91-2.

Mr. Hoke was asked on cross-examination:

"Q. Just one question, Officer Hoke. Was it the exact words from Mr. Reek that it was his intent to defraud the Store?
A. No.

Q. Thank you." RP 97.

According to the comment to WPIC 6.41:

> "Although the instruction is normally used when the defendant challenges the voluntariness of a confession, the instruction may also be used when the prosecution offers an alleged confession and the defendant denies making the confession. *State v. Hubbard*, 37 Wn.App. 137, 679 P.2d 391 (1984), *reversed on other grounds*, at 103 Wn.2d 570, 693 P.2d 718 (1985)."[7]

11 *Washington Practice* 196.

Not only did the state offer Mr. Reek's incriminating statements but they also argued during closing argument that Mr. Reek admitted he attempted to defraud Walmart when he entered the store. The state was able to argue during closing argument:

> "MS. DENNIS: "...And this little compilation is going to be the basis of the two counts of forgery. Well, one. This is a fake identification in the name of Anthony Garcia. And the defendant possessed it. It's a forged document. He knew it to be forged because he made it himself. And he possessed it with intent to defraud Walmart. And we know that because he admitted that to Officer Hoke.
>
> Not only is there the Anthony Garcia identification, but you will notice on here there's another identification in the name of Clint – no– Nichols Clint. There's a couple different copies of Nichols Clint. That's the other forged identification that he possessed. It's the same thing. He knew it was forged because he made it myself. And he possessed it with the intent to defraud Walmart. And we know that because he admitted that

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[7] In *Hubbard* the jury received evidence of an alleged admission by Hubbard. He denied making the statement and objected to the WPIC 6.41 instruction. The appellate court found no error in giving this instruction.

to the officer. That's Count III, Count IV. " II RP 193-4.

Later, the prosecutor again argued the defendant's alleged admissions to Officer Hoke:

> "Counts I, II, III, IV and VIII are all contained on the August 17th series of facts that we have gone over before. I mean, we have got the pictures for that, we have got the identification, the false ID for that, we have got him present, the testimony that he presented his false ID. So he's intending to defraud Walmart. His admission that he intended to defraud Walmart. So he entered unlawfully with the intent to commit a crime. We have got all of his doctored documents that were taken from his car. Take a look at those. Those will support Counts III and IV." II RP 203.

Mr. Reek was prejudiced by the refusal of the trial court to allow argument to the jury that they could give such weight and credibility to any alleged out-of-court statements by Mr. Reek. The defense should have been able to counter the plaintiff's arguments concerning Mr. Reek's alleged admissions during closing argument. Also, when considering Mr, Reek's alleged admissions to a least five counts, the jury should at least have been enabled to take into consideration the surrounding circumstances of the statements; i.e, the first admission having been uttered before officer Hoke read Mr. Reek the *Miranda* warnings. RP 46-7, 92.

IV. THE TRIAL COURT ERRED WHEN IT DID NOT CONDUCT A HEARING TO ALLOW FORMAL OBJECTION TO THE COURT'S INSTRUCTIONS.

Although the court stated that it was going to consider objections and exceptions to the instructions, it did not offer the defense an opportunity to formally object to the court's final instructions or except to those instructions proposed by the defense that the court rejected. II RP 175. The court stated preliminarily:

> "THE COURT: Let's go ahead and talk about the jury instructions. As the State has proposed the jury instructions, are there any instructions to which the defense has any objections or exceptions." RP 175.

That was the extent of consideration of exceptions to the court's final instructions.[8]

> CrR 6.15 (c) Objections to Instructions.
>
> Before instructing the jury, the court shall supply counsel with copies of the proposed numbered instructions, verdict and special finding forms. The court shall afford to counsel an opportunity in the absence of the jury to object to the giving of any instructions and the refusal to give a requested instructions or submission of a verdict or special finding form...."

According to *State v. Guzman Nunez*, 160 Wn.App. 150, 157, 248 P.3d 103 (Div. III 2011) "Manifiest error affecting a constitutional right"

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[8] The only other location in the record where the court's final instructions were assembled was when the court stated: "Counsel, I'm handing down copies of the Court's instructions pursuant to our earlier discussion and copies of the verdict form. RP 183.Then subsequently, "You have the Court's instructions. If I can have the bailiff pass these out and put them on the chairs for each of the jurors, please." RP 185.

is one of the exceptions that can be raised for the first time on appeal. RAP 2.5(a)(3).

The purpose of requiring a timely objection to instructions given or refused is so "...that the trial court may have the opportunity to correct any error." *State v. Scott*, 110 Wn.2d 682,686, 757 P.2d 492 (1988).

The failure to give the defendant's proposed instruction affected the defendant's rights at trial. This was constitutional error because it affected the evidence in the case in relation to admissions of guilt. See, *State v. O'Hara,* 167 Wn.2d 91,98, 217 P.3d 756 (2009). The appellant must "identify a constitutional error and show how the alleged error actually affected the [appellant's] rights at trial." in order to demonstrate that an error qualified as manifest constitutional error.

V. THE TRIAL COURT ERRED WHEN IT DENIED THE DEFENDANT'S MOTION TO DISMISS COUNTS I AND II WHICH ALLEGED BURGLARY IN THE SECOND DEGREE.

The trial court erred when it denied the defendant's half time motion to dismiss Counts I and II which alleged Burglary in the Second Degree. II RP 168-171. After the state rested the defense moved to dismiss the two burglary charges. RP 168. At that time, the defense argued:

> "The burglary statute is directed towards a person or property. And from what testimony has been provided at this time, Walmart seems to be the victim, and Walmart is not a person or property.

> Now, I do understand that the definition of person, by statute, if I can find it here, according to 9A.04.110, it says that, sub (17), "'Person', 'he' and 'actor' include any natural person and, where relevant, a corporation, joint association, or an unincorporated association." [9]
>
> The defense position is that it is not relevant in this particular case that the definition of a "person" should include a corporation. Just because the State has made them the victim does not make it relevant to include a corporation within the definition of a person."

II RP 168-9.

The standard of review is sufficiency of the evidence. According to *State v. Clark,* 143 Wn.2d 731, 24 P.3d 1006, *cert. denied,* 534 U.S. 1000 (2001) evidence of a charge or element is sufficient, if, viewed in the light most favorable to the state, a rational trier of fact could have found guilt beyond a reasonable doubt. *State v. Gentry,* 125 Wash.2d at 596, 88 P.2d 1105. All reasonable inferences from the evidence must be drawn in favor of the state and interpreted most strongly against the defendant. *id.* at 597.

RCW 9A.52.030(1) states as follows:

> "(1) A person is guilty of burglary in the second degree if, with intent to commit a crime against a person or property therein, he enters or remains unlawfully in a building,

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[9] RCW 9A.04.110(17) Person has been defined as "Person", "he", and "actor" include any natural person and, where relevant, a corporation, joint stock association, or an unincorporated association;"

other than a vehicle or a dwelling."

WPIC 60.04 (2nd ed. supp 2005) includes as one element of burglary in the second degree: "(2) That the entering or remaining was with intent to commit a crime against a person or property therein;..." CP 152; Instr. 19.

According to *State v. Stinton,* 121 Wn.App. 569, 574, 289 P.3d 717 (Div. II 2004) person is defined by *State v. Barnett,* 139 Wn.2d 462, 469, 987 P.2d 626 (1999): "[a] plain and ordinary definition of the phrase 'crime against a person' would be one encompassing any offense involving unlawful injury or threat of injury to the person or physical autonomy of another." (residential burglary case involving RCW 9A.52.025).

The defense argued:

> "...the burglary laws are based primarily upon a recognition of the danger to personal safety created by the usual burglary situation and that the burglary statutes are enforced because of our recognition and protection of the person, not a corporation or some other nonentity.
>
> "...the defense's position is that the State needs to prove that Mr. Reek entered unlawfully a building with intent to commit a crime against a person or property and that there is no information or no evidence to support that." RP 170.

VI. THE DEFENDANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL

Philip A. Grimes identified exhibit 1 as a Walmart trespass notice issued to the defendant in September 2007. RP 61. Exhibit 2 was identified as a photograph of the defendant from the Port Angeles store. RP 62. It was attached to a trespass notice that was dated September 5, 2007. RP 63. The defendant's attorney objected to admission of exhibit 2 but not of exhibit 1. RP 64. The defendant contends on appeal that this resulted in ineffective assistance of counsel.

Standard of Review

According to *In re* Riley, 122 Wn.2d 772, 863 P.2d 554 (1993):

> "The sixth amendment to the United States Constitution guarantees a criminal defendant the right "to have assistance of counsel for his defense." U.S. Const. amend. 6. The right to counsel means the right to the effective assistance of counsel."

id. at 779-80, (citing *Strickland v. Washington*, 466 U.S. 668,686, 80 L.Ed.2d 674, 104 S.Ct. 2052 (1984)(citing *McMann v. Richardson*, 397 U.S. 759, 771 n. 14, 25 L.Ed. 763, 90 S.Ct. 1441 (1970). See also, article one, section 22 of the Washington Constitution.

The *Strickland* test is set forth in *State v. Thomas*, 109 Wn.2d 222,225-26, 743 P.2d 816 (1987):

> "First, the defendant must show that counsel's performance was deficient. That requires showing

> that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth amendment. Second, the defendant must show that the deficient performance prejudiced the defense...See also, *State v. Jeffries*, 105 Wn.2d 398,418, 717 P.2d 722, *cert. denied*, 93 L.Ed.2d 301 (1986); *State v. Sardinia*, 42 Wn.App. 533, 713 P.2d 122 (1986)."

(citing *Strickland v. Washington*, 466 U.S. at 687).

According to *State v. Benn*, 120 Wn.2d 631,663, 845 P.2d 289 (1993):

> "A defendant is denied effective assistance of counsel if the complained-of attorney conduct (1) falls below a minimum objective standard of reasonable attorney conduct, and (2) there is a probability that the outcome would be different but for the attorney's conduct. *Strickland v. Washington*, 466 U.S. 668,687-88, 694, 80 L.Ed.2d 674, 104 S.Ct. 2052 (1984)."

Both prongs of the *Strickland* test have been described as:

> "Under one prong-the performance prong-the defendant must show that counsel's performance was deficient. Under the other prong-the prejudice prong-the defendant must how that the deficient performance prejudiced the defense."

In re Riley, 122 Wn.2d at 780, citing *Strickland*, 466 S.Ct. at 687. The Supreme court adopted this test in *State v. Jeffries*, 105 Wn.2d at 418.

According to *Thomas*,

> "To meet the requirement of the second prong defendant has the burden to show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.

> *A reasonable probability is a probability sufficient to undermine confidence in the* outcome.

109 Wn.2d at 226 (citing *Strickland*, at 694) ((court's italics.)

However,

> "If defense counsel's trial conduct can be characterized as legitimate trial strategy or tactics, then it cannot serve as a basis for a claim that the defendant did not receive effective assistance of counsel. *State v. Adams*, 91 Wn.2d 86,90, 586 P.2d 1168 (1978)."

State v. Lord, 117 Wn.2d 829,883, 822 P.2d 177 (1991), *cert. denied*, 113 S.Ct. 164 (1992).

Ineffective Assistance During Trial

Defense counsel neglected to object to the entry of the notice of trespass (ex. 1) that was offered in conjunction with Mr. Reek's alleged photograph (ex. 2);. RP 62-4. Yet, defense counsel argued during closing:

> "This trespass notice was in 2007, two years prior to that [2009]. Did the State bring in the individual who dealt with Mr. Reek in 2007 who works at Walmart store today to be able to describe to you and give you evidence about what occurred on this day in September of 2007? That's the State's burden of proof. And that's why we're here...Instead, the State, rather than bringing in testimony, the State brings in two pieces of paper. Now, ladies and gentlemen of the jury, that is from August 13th and August 5th, I believe are the times that the State is alleging that Mr. Reek was criminally trespassed and unlawfully in the store... We don't know whether or not Mr. Reek was aware of this trespass notice or the contents of it." RP 206-08.

Ineffective Assistance at Sentencing

At sentencing the prosecutor sought an exceptional sentence on count II (burglary in the second degree). The standard range was 51 to 68 months. The prosecutor recommended 90 months because it was argued that Mr. Reek "...has shown little to no remorse or willingness to take responsibility for his actions." 12/3/10 RP 3.

Mr. Reek's trial counsel failed to present any mitigating evidence during the hearing, except that Mr. Reek was a candidate for a DOSA sentence. RP 204-16. See generally, *Williams v. Taylor,* 529 U.S. 362, 120 S.Ct. 1495, 146 L.Ed 389 (2000). (defendant denied his right to effective assistance of counsel when his attorneys failed to investigate and to present substantial mitigating evidence during the sentencing phase of a capital murder trial.)

More specifically, according to Seth A. Fine and Douglas S. Ende, 13B Washington Practice 434 (2d ed. 1998) courts have recognized non-statutory mitigating factors such as a defendant providing favorable testimony against an accomplice. *State v. Nelson,* 108 Wn.2d 491, 499, 740 P.2d 835 (1987); see statutory mitigating factors: RCW 9.94A.535(1). (Compare CrR 3.5 court's determination of Mr.Reek's readily admissions at the time of initial police contact.)

VII. THERE WAS NOT SUFFICIENT EVIDENCE OF THE CRIMES OF BAIL JUMPING.

The state did not prove the elements of the alleged crimes of bail jumping-two counts- because the court clerk who testified was not present at the defendant's court appearances and she did not observe the defendant actually being handed a copy of the court's notice.[10]

According to *State v. Bingham*, 105 Wn.2d 280,823, 719 P.2d 109 (1986):

> "The constitutional standard for reviewing the sufficiency of the evidence in a criminal case is "Whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 61 L.Ed.2d 560, 99 S.Ct. 2781 (1979); *State v. Green*, 94 Wn.2d 216,221, 616 P.2d 628 (1980)."

See also, *State v. Rempel*, 114 Wn.2d 77,82, 785 P.2d 1134 (1990); *State v. Hughes*, 106 Wn.2d 176, 721 P.2d 902 (1986).

It was stated in *Jackson v. Virginia,* 443 U.S. at 316:

> "In short, *Winship*, presupposes as an essential of the due process guaranteed by the Fourteenth Amendment that no person shall be made to suffer the onus of a criminal conviction except upon sufficient proof-defined as evidence necessary to

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[10] On the court's form there is no place for the defendant to sign in order to prove receipt of a copy of the notice. CP 19-Ex.5; CP 45-Ex. 11.

(citing *In re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970)).

Here, the court clerk could not testify that the defendant actually received a copy of the court's notice in any manner. The testimony was that a clerk checks the appropriate box and then hands the pleading to the defendant's attorney at the hearing. The clerk testified:

> "Q. On that, do you have personal knowledge that that occurred?
> A. If I was sitting in the courtroom, you mean, as personal knowledge? No.
> Okay. What you were – What was that?
> A. Not that I was sitting in the courtroom and heard him.
> Q. Okay.
> A. We rely on the minutes. The minutes indicate that he received a copy. He signed the order sets – or the documents that were appropriate to sign. Usually, I don't think he signed the order set, but he's given a copy.
> Q. So you don't know whether or not Mr. Reek on the dates in question actually heard what was told of his next court date, correct? You're just relying that a box was marked?
> A. Correct.
> Q. Okay. Is there a procedure for the clerks that are in the courtroom to affirmatively verify that the individual actually hears the court date?
> A. We don't ask them to repeat it back to us. Specifically, a judge may do that occasionally, but as a general rule, it's not done.
> Q. Okay. And you don't have any testimony that it was done in this case, correct?
> A. No, I don't I haven't reviewed any transcripts, so I don't know that.
> Q. Do you have a procedure that the clerk in the court-room actually has to verify that the individual receives the written notice?

Q. Do you have a procedure that the clerk in the court-room actually has to verify that the individual receives the written notice?
A. They do not check the boxes until the procedure happens. They don't check them in advance assuming he's going to show up or assuming he's going to get a copy. They check the boxes when it happens.
In many cases, the paperwork is handed to defense counsel, which would be yourself, to be distributed.
Q. Okay. And does the clerk that's in the courtroom, are they trained to determine whether or not that defense counsel handed the paperwork to the defendant?
A. No, we don't. We assume that –
Q. That's an assumption?
A. – the attorney will take care of that for their client.
Q. And is it fair to say it's also assumed that the individual client standing in the courtroom hears the oral notice as well? It's assumed, correct?
A. Yes.
Q. But there's no mechanism or procedure to make sure that that actually did occur before that box is checked?
A. No. RP 155-57 (see appendix: minute entry and orders setting)

One of the elements of Bail jumping is: "That the defendant has been released by court order with knowledge of the requirement of a subsequent personal appearance before that court..." WPIC 120.41 (2nd. Ed. 1994); CP 158,159160; RCW 9A.76.170(1). (See appendix for copy of statute and of trial court's instructions No.25-27. According to *State v. Cardwell,* 155 Wn.App. 41,47, 226 P.3d 243 (Div. II 2010):

> "In order to meet the knowledge requirement of the statute, the state is required to prove that a defendant has been given notice of the required court dates."

The defense argued during closing argument:

> "Ms. Rogers even stated, which brings me to the bail jumps, she couldn't testify whether or not Mr. Reek knew of that court date. She can't testify whether-- She doesn't have knowledge whether he heard the judge say the court date, whether he received the paperwork. But she said, you know, if the transcript would have been brought in, that would have told it...That evidence is available. You could have had within your possession evidence to be able to determine whether or not Mr. Reek knew of those court dates. It is available. The State didn't bring it to you. And that's their burden...." RP 213.

> "Mrs. Rogers testified that, you know, she doesn't have personal knowledge of whether Mr. Reek heard of the court dates, whether he obtained a written copy. She testified that there's no procedure –you know, the clerk in the court marks the box, but there's no procedure for the clerk to actually monitor whether or not the box she's checking actually occurred....." RP 214.

Thus, except for an unknown clerk marking a box on the clerk's minutes- of which they have no personal knowledge- Mr. Reek would not have been convicted of two counts of bail jumping. exs. 6,10. See *State v. Badda,* 63 Wn.2d 176, 182-3, 385 P.2d 859 (1963) where the Supreme Court rejected evidence contained in the clerk's minutes to substantiate whether a jury verdict was unanimous or not. The court stated:

> "...the record does not disclose the questions asked and the answers given in the poll of the jury, but simply the clerk's notation that is was unanimous, how can a court of review rule with the same degree of confidence that the clerk's minutes show a unanimous verdict."

id. at 182-3. (See appendix for copy of clerk's minute entry, Ex.6.)

VIII. PROSECUTORIAL VINDICTIVENESS

At the pre-trial hearing on September 23, 2009 the prosecutor indicated that it had held back charges of forgery and retail theft. 9/23/09 RP 3. The next month, on the day set for trial the prosecutor added one count of forgery in its first amended information. 10/12/09 RP 8-9; CP 14-16.

After the defendant failed in his Drug Court petition because of his failure to appear on November 6, 2009 and his arrest on a bench warrant, the prosecutor filed a second amended information alleging seven counts. CP 28-32. These included two counts of burglary in the second degree; three counts of forgery all occurring on August 17, 2009; one count of bail jumping for the November 6, 2009 hearing and one count of Making a False or Misleading Statement to a Public Servant on August 17, 2009. 6/8/10 RP 2-4.

The prosecutor indicated on August 10, 2010- as the case moved closer to another trial date- that it was contemplating filing additional charges. One additional count of bail jumping, and two counts of trespassing. 8/10/10 RP 3. On the date set for trial the prosecutor contemplated filing a ten-count third amended information. 9/7/00 RP 2. However, the defendant did not appear on the trial date.

Mr. Reek was originally charged with one count of Burglary in the

Mr. Reek was originally charged with one count of Burglary in the Second Degree and one count of forgery, alleged to have occurred on August 17, 2009. CP 1-2. By the time of trial he had been charged with eleven counts. Three of these counts alleged Bail Jumping that occurred on November 6, 2009, July 13, 2010 and September 7, 2010. CP 70-2. However, six new charges were filed based on exercise of his right to have the matter tried.[11]

According to precedent this error may be raised for the first time on appeal. For instance, in *State v. Curtis,* 110 Wn.App. 6, 37 P.3d 1274 (2002) the appellate court stated:

> "This is a claim of manifest constitutional error, which can be raised for the first time on appeal. RAP 2.5(a)(3);[12] *State v.*

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[11] The fourth Amended information was filed on the day of trial as follows: Count I alleged Burglary in the Second degree on 8/17/09; Count II alleged Burglary in the Second Degree on 8/17/09; Count III alleged Forgery on 8/17/09; Count IV charged Forgery on 8/17/09; Counts V, VI and VII alleged Bail Jumping; Count VIII alleged Making a False Statement to a Public Servant on 8/17/09; count IX alleged Making a False Statement to a Public Servant on 5/10/2010; Count X alleged Criminal Trespass in the First Degree on 8/5/09 and Count XI alleged Criminal Trespass in the First Degree on 8/13/09. CP 68-74.

[12] RAP 2.5(a)(3) states in part: (a) Errors Raised for First Time on Review. The appellate court may refuse to review any claim of error which was not raised in the trial court. However, a party may raise the following claimed errors for the first time in the appellate court:...(3) manifest error affecting a constitutional right." (See appendix where RAP 2.5 (a) is set forth in full.)

> *State v. Neidigh*, 78 Wn.App. 71,78, 895 P.2d 423 (1995). Review is de novo. *State v. Byers*, 88 Wn.2d 1, 11, 559 P.2d 1334 (1977), *overruled on other grounds by State v. Williams*, 102 Wn.2d 733, 689 P.2d 1065 (1984)."

State v. Curtis, 110 Wn.App. at 11.

According to *United States v. Goodwin,* 457 U.S. 368, 102 S.Ct. 2485, 73 L.Ed.2d 74 (1982) the claim of prosecutorial vindictiveness may be raised pretrial, on appeal or upon retrial (constitutional due process principles prohibit prosecutorial vindictiveness, *id.* at 457 U.S. 372-85.) (no presumption of prosecutorial vindictiveness when prosecution filed a more serious charge after the defendant refused to plead guilty.[13] (Defendant's due process rights were not violated when a prosecutor carried out a threat to seek habitual offender indictment if defendant did not plead to original charge.)

"'Prosecutorial vindictiveness is [the] intentional filing of a more serious crime in retaliation for a defendant's lawful exercise of a procedural right.'" *State v. Lee,* 69 Wn.App. 31, 35, 847 P.2d 25 (1993) (quoting *State v. McKenzie,* 31 Wn.App. 450, 452, 642 P.2d 760 (1981).[14]

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[13] (affirming *Bordenkircher v. Hayes,* 434 U.S. 357, 360-65, 98 S.Ct. 663, 54 L.Ed.2d 604 (1978).

[14] "Prosecutorial vindictiveness occurs when 'the government acts against a defendant in response to the defendant's prior exercise of constitutional or statutory rights.'" *State v. Korum* 157 Wn.2d 614, 627, 141 P.2d (2006) (quoting *United States v. Meyer,* 258 U.S. App. D.C. 263,

The standard of review is de novo. "Constitutional due process principles prohibit prosecutorial vindictiveness." *State v. Korum,* at 627.

Here, the additional charges were not added based on any further investigation or review of the case but in retaliation for the exercise of constitutional rights by Mr. Reek.

The federal court stated in *Hardwick v. Doolittle,* 558 F.2d 292, 301 (5th Cir. 1997) *cert. denied* 434 U.S. 1049 (1978) once a prosecutor exercises his discretion to bring certain charges against a defendant neither her nor his successor may, without sufficient explanation, increase the number of or severity of the charges in circumstances which suggest the increase is in retaliation for the defendant's exercise of statutory or constitutional rights.

According to *State v. Gamble*, 168 Wn.2d 161, 186, 225 P.3d 973 (2010) a presumption of prosecutorial vindictiveness arises when a defendant can prove that 'all of the circumstances, when taken together, support a realistic likelihood of vindictiveness.' *State v. Korum,* 157 Wn.2d at 627 (successful withdrawal of guilty plea) (quoting *United States v. Meyer,* supra n. 11) (prosecutorial vindictiveness occurs when the government acts against the defendant's exercise of constitutional or

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810 F.2d 1242, 1245-46 (1987)).

statutory rights. *Id.* at 810 F.2d 1245). *See also, State v. Roy*, 147 Wn.App. 309, 317, 195 P.3d 967 (Div. III 2008) *review denied,* 165 Wn.2d 1051 (2009).

Examination of this record supports the conclusion that the State brought greater charges to penalize Mr. Reek for asserting his rights. Division II stated in *State v. Korum,* 120 Wn.App. 686, 86 P.3d 166 (2004), *reversed* 157 Wn.2d 614 (2006) as follows:

> "[A] public prosecutor is a quasi-judicial officer who represents the State and must "act impartially." A prosecutor's duty to do justice on behalf of the public transcends mere advocacy of the State's case: "[T]he prosecutor's ethical duty is to seek the fairest rather than necessarily the most severe outcome." The fairest outcome may include refraining from filing criminal charges legally supported by the evidence if filing those charges will result in statutorily-authorized punishment disproportionate to the particular offense or offender.
>
> We acknowledge and respect the broad ambit to prosecutorial discretion, most of which is not subject to judicial control. Under the Sentencing Reform Act of 1981 (SRA), our Legislature has given prosecutors great latitude in determining what charges to file against a defendant. *State v. Lewis*, 115 Wash.2d 294,229, 797 P.2d 1141 (1990). Nonetheless, the legislature did not leave the prosecutor's discretion unbridled."

State v. Korum, 120 Wn.App. 700-1 (footnotes omitted.)

In RCW 9.94A.411(2), sub-captioned "Decision to prosecute" the legislature limited prosecutors' charging discretion as follows as follows:

> (a) Standard:)
> (i) The prosecutor should file charges which adequately

describe the nature of defendant's conduct. Other offenses may be charged only if they are necessary to ensure that the charges:
(A) Will significantly enhance the strength of the state's case at trial; or
(B) Will result in restitution to all victims.
(ii) The prosecutor should not overcharge to obtain a guilty plea. Overcharging includes:
(A) Charging a higher degree;
(B) Charging additional counts.

This standard is intended to direct prosecutors to charge those crimes which demonstrate the nature and seriousness of a defendant's criminal conduct, but to decline to charge crimes which are not necessary to such an indication. Crimes which do not merge as a matter of law, but which arise from the same course of conduct, do not all have to be charged.

RCW 9.94A.411 (2)(a) subtitled "Selection of Charges/Degree of Charges."[15]

In addition to these legislative limitations, there are constitutional constraints on a prosecutor's exercise of discretion in charging crimes. According to *Hardwick v. Doolittle*, supra at 301:

> "[A] prosecutors discretion to reindict a defendant is constrained by the due process clause....[O]nce a prosecutor exercises his discretion to bring certain charges against a defendant, neither he nor his successor may, without explanation, increase the number of or severity of those

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[15] Former RCW 9.94A.440(2). By comparison, see *Korum* at 626-7 and the Supreme Court's comment: "The subsequent suggestions that a "prosecutor should not overcharge to obtain a guilty plea" does not restrict the prosecuting attorney's discretion to make the decision to charge crimes against persons. Former RCW 9.94A.440(2)(2)." id. 157 Wn.2d 626, n.3.

> charges in circumstances which suggest that the increase is retaliation for the defendant's assertion of statutory or constitutional rights."

It is debatable whether the added charges were "filed in the routine course of prosecutorial review or as a result of continuing investigation." *(United States v. Gamez-Orduno,* 235 F.3d 453, 463 (9th Cir. 2000) (quoting *United States v. Gallegos-Curiel,* 681 F.2d 1164, 1169 (9th Cir. 1982). There must be an absence of a realistic likelihood of prosecutorial abuse.

IX. BASED ON THE CUMULATIVE ERROR DOCTRINE THIS COURT SHOULD REVERSE THE VERDICTS.

According to *State v. Price,* 126 Wn. App. 617, 655, 109 P.3d 27 (Div. II 2005) the cumulative error doctrine may be invoked where "...a defendant may be entitled to new trial when errors of counsel cumulatively produce a trial that is fundamentally unfair. *State v. Greiff,* 141 Wn.2d 910, 10 P.3d 390 (2000)." This results in denial of a fair trial in violation of the due process clauses of the Fourteenth Amendment and of Cons. Art. 1, sec. 3 (see appendix for constitutional texts).

The cumulative error doctrine also applies to instances where there have been several trial errors that standing alone may not be sufficient to justify reversal, but when they are combined they may deny an accused a fair trial. *Grieff,* 141 Wn.2d at 929. See *State v. Whalon,* 1 Wn.App.

785,804, 464 P.2d 730 (1970) "(reversing conviction because (1) court's severe rebuke of the defendant's attorney in the presence of the jury, (2) court's refusal of the testimony of the defendant's wife, and (3) jury listening to tape recording of line-up in the absence of court and counsel)." *Grieff*, 141 Wn.2d at 929.

See also, *State v. Badda*, supra 63 Wn.2d at 183, conviction for two counts robbery where the court held that the combined effect of an accumulation of errors, no one of which standing alone "might be of sufficient gravity to constitute rounds for reversal, may well require a new trial." (failure to give precautionary instruction, failure to give instruction to disregard prejudicial remarks by prosecutor, inadequate accomplice instruction and failure to instruct on requirement of a unanimous verdict required reversal.)

It may be argued that standing alone, none of the errors discussed above requires reversal. However, it does appear reasonably probable that the cumulative effect of those errors may have materially affected the outcome of this case. It was stated in *State v. Russell*, 125 Wn.2d 24, 93-4, 882 P.2d 747 (1994):

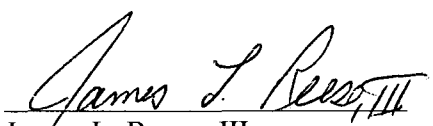
> "It is well accepted that reversal may be required due to the cumulative effects of trial court errors, even if each error examined on its own would otherwise be considered harmless. *See State v. Coe*, 101 Wn.2d 772,789, 684 P.2d 668 (1984); *State v. Badda*, 63 Wn.2d 176,183, 385 P.2d

859 (1963); *State v. Alexander*, 64 Wn.App. 147,154, 822 P.2d 1250 (1992)."

D. Conclusion

This Court should reverse the defendant's convictions and remand the case for a new trial. In the alternative this Court should reverse the defendant's conviction for Burglary in the Second Degree and remand the case for re-sentencing.

Dated this 24th day of August, 2011.



James L. Reese, III
WSBA #7608
Court Appointed Attorney
For Appellant

RECEIVED AND FILED
IN OPEN COURT
OCT 27 2009
DAVID W. PETERSON
KITSAP COUNTY CLERK

Superior Court of Washington
County of Kitsap

TATE OF WASHINGTON,
Plaintiff,
vs.
Anthony Reek,
Defendant.

No. 09-1-01134-4

ORDER SETTING TRIAL DATE AND/OR OTHER HEARINGS

(ORSTD/ORST/ORSOH)

IS ORDERED that:

THE FOLLOWING COURT DATES ARE SET FOR THE DEFENDANT:

☒-Omnibus ☐-FA ☐-3.5(s) ☐-3.6(s) ☐-Change of Plea ☐-Sentencing ☐-Restitution [☐*Sign or Set* ☐*Hearing*]
☐-Fact Finding ☐-Disposition ☐-Drug Court ☐-Formal Charging ☒-Status *(Re:* Drug Court)
(Date) 11/9/09 **(Time)** 130 ☐ a.m ☒ p.m. Dept./Visiting Judge _____ ☐ Special Set

☒ Drug Court Petition **(Date)** 11/6/09 **(Time)** 9:00 ☒ a.m. ☐ p.m.
Dept./Visiting Judge _____ ☐ Special Set

☐ _____ **(Date)** _____ **(Time)** _____ ☐ a.m. ☐ p.m.
Dept./Visiting Judge _____ ☐ Special Set

☒ Trial on: **(Date)** 12/14/09 (Time) 9:00 a.m. Dept./Visiting Judge _____

The Defendant must personally be present at these hearings at: **SUPERIOR COURT OF WASHINGTON**
Address: **614 Division Street**
Port Orchard, WA 98366

timated length of trial/hearing: _____

60 ☒90 day expiration date: 1/13/10

ike Trial Date Of: 11/2/09

te of Arraignment: ☐ Today ☐ _____
[Complete only if this order sets the initial trial date. CrR 3.3(d)(1).]

)TE: IF YOUR CASE IS PUT ON STANDBY, YOU WILL BE :QUIRED TO BE IN COURT ON TWO HOURS NOTICE.

.TED: 10/27/09

NOTICE IS HEREBY GIVEN THE COURT HAS SET THE ABOVE DATE(S) FOR TRIAL AND/OR HEARING(S) IN THIS CASE.

FAILURE TO OBJECT TO THE DATE OF TRIAL ON THE GROUNDS IT IS NOT WITHIN THE TIME LIMITS PRESCRIBED BY CrR 3.3, WITHIN TEN (10) DAYS OF THE DATE ON WHICH TRIAL IS SET, WILL WAIVE ANY OBJECTION THAT THE TRIAL DATE IS IN VIOLATION OF CrR 3.3.

FAILURE TO OBJECT AT THE TIME OF ARRAIGNMENT TO THE DATE OF ARRAIGNMENT SET IN THIS CASE ON THE GROUNDS THAT IT IS NOT WITHIN THE LIMITS PRESCRIBED BY CrR 4.1(a), WILL WAIVE ANY OBJECTION THAT THE ARRAIGNMENT DATE IS IN VIOLATION OF CrR 4.1.

JUDGE/COURT COMMISSIONER/SCHEDULER

Original - Court File
Green - Court Scheduler
Yellow - Defendant
Pink - Defense Attorney: ☐ Crawford ☐ Case ☐ Hunko ☐ Ness ☐ Rovang ☐Other: _____

Briefs Due: State-_____; Defense-_____; Reply-_____

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SUPERIOR COURT OF WASHINGTON
COUNTY OF KITSAP

THE STATE OF WASHINGTON

vs.

ANTHONY REEK

Defendant

Hon. JEANETTE DALTON

Court Reporter CAROL WRIGHT

Court Clerk GINA VINECOURT

Date OCTOBER 27, 2009

No. 09-1-01134-4

The State of Washington represented by C. Enright, Deputy Prosecuting Attorney

The Defendant appearing YES/NO [✓] In custody [ ] Not in custody Represented by T. Robinson

The matter before the court is:

- ☐ Preliminary Appearance
- ☐ Formal Charging
- ☐ Arraignment
- ☐ Omnibus
- ☐ Call Only
- ☐ Stipulated Facts Trial
- ☐ Change of Plea
- ☐ 3.5(s) / 3.6 (s) / FA
- ☐ Waiver of Extradition
- ☐ Status_____
- ☐ Mot to With/Sub Counsel
- ☐ Motion _____
- ☐ Motion For / To Quash Bench Warrant
- ☐ Return on Bench Warrant
- ☐ Motion to Continue _____
- ☐ Reset _____
- ☑ Motion for PR Release and/or Bail Reduction
- ☑ Drug Court

☑ Defendant answers to true name as charged ☐ Advised of Rights ☐ Signed ☐ Read in Open Court
☐ Served with true copy of Arrest Offense/Information (Amended) ☐ Read in Open Court/Reading Waived
☐ Counsel Appointed: Crawford/Ness/Hunko/Hemstreet/Rovang/Tyner/LaCross/Other_____
☐ Will Retain Counsel _____
☐ Released on P. R. ☐ Bail set at/reduced to $_____ ☐ Cash Only ☐ Concurrent with_____
☐ Release Conditions Order Signed ☐ Waiver of Extradition Signed ☑ Amended Release Order Signed
☐ Prosecutor Sworn to give Probable Cause/Further Summary for plea ☐ Probable Cause waived
☐ Court finds Probable Cause ☐ Probable Cause/Plea established through warrant/certification
☐ No Contact Order signed ☐ No Contact Order served on Defendant ☐ Book and Release

☐ Not Guilty Plea ☐ Guilty Plea ☐ Alford Plea ☐ Court finds Defendant guilty on his/her plea of guilty
☐ Plea Agreement signed ☐ Statement on Plea of Guilty Signed ☐ Order Detaining/Releasing after conviction
☐ Court Finds Defendant Guilty on Stipulated Facts ☐ Pre-sentence Investigation ordered
☐ Notification of Conviction and Firearm Warning signed
☐ Omnibus/3.5 Stipulation Signed ☐ Defendant Waives Speedy Trial/Sentencing to _____
☐ Order Approving Investigator Funds ☐ Bail Bond Extended Pending Sentencing
☐ Defendant advised of further arraignment ☐ Court orders Bail Forfeited/Exonerated

Omnibus _____ at _____ am/pm Formal Charging/Entry of Plea _____ at _____ am/pm

Set for Trial 12-14-2009 at 9:00 am Drug Court Hearing 11-06-09 at 9:00 am/pm

3.5(s)/3.6(s)/Further Arraignment/ Change Of Plea/Status 11-09-09 at 1:30 am/pm

Motion/Special Set hearing for _____ set re: Drug Court at _____ am/pm

Sentencing date _____ at _____ am/pm ☐ Defendant remanded

☐ **Courtroom Polled: No Response** Time _____ **am/pm**

☐ **Bench Warrant Ordered/Quashed** ☐ **Bail set at $_____ Consecutive/Concurrent** ☐ **Cash only**

☑ Written and oral notice given to defendant for above-set dates ☑ Motion Granted/~~Denied~~ ☐ Matter Stricken
☑ Court Scheduler notified of Special Set/Trial ☑ Strike trial date of 11-02-09
☐ Pleadings/File taken from this hearing by _____

B

RECEIVED AND FILED
IN OPEN COURT

JUN 29 2010

DAVID W. PETERSON
KITSAP COUNTY CLERK

Superior Court of Washington
County of Kitsap

STATE OF WASHINGTON, Plaintiff,

vs.

Anthony Reek, Defendant.

No. 09-1-01134-4

ORDER SETTING TRIAL DATE AND/OR OTHER HEARINGS

(ORSTD/ORST/ORSOH)

IT IS ORDERED that:

1. **THE FOLLOWING COURT DATES ARE SET FOR THE DEFENDANT:**

☐-Omnibus ☐-FA ☒-3.5(s) ☐-3.6(s) ☐-Change of Plea ☐-Sentencing ☐-Restitution [☐*Sign or Set* ☐*Hearing*]
☐-Fact Finding ☐-Disposition ☐-Drug Court ☐-Formal Charging ☒-Status *(Re:* Atty)
(Date) 7/13/10 **(Time)** 1:30 ☐ a.m ☒ p.m. Dept./Visiting Judge _____ ☐ Special Set

☐ _____ **(Date)** _____ **(Time)** _____ ☐ a.m. ☐ p.m.
Dept./Visiting Judge _____ ☐ Special Set

☐ _____ **(Date)** _____ **(Time)** _____ ☐ a.m. ☐ p.m.
Dept./Visiting Judge _____ ☐ Special Set

☐ Trial on: **(Date)** _____ (Time) 9:00 a.m. Dept./Visiting Judge _____

2. The Defendant must personally be present at these hearings at: **SUPERIOR COURT OF WASHINGTON**
Address: 614 Division Street
Port Orchard, WA 98366

Estimated length of trial/hearing: _____

☐ 60 ☐ 90 day expiration date: _____

Strike Trial Date Of: _____

Date of Arraignment: ☐ Today ☐ _____
[Complete only if this order sets the initial trial date. CrR 3.3(d)(1).]

NOTE: IF YOUR CASE IS PUT ON STANDBY, YOU WILL BE REQUIRED TO BE IN COURT ON TWO HOURS NOTICE.

NOTICE IS HEREBY GIVEN THE COURT HAS SET THE ABOVE DATE(S) FOR TRIAL AND/OR HEARING(S) IN THIS CASE.

FAILURE TO OBJECT TO THE DATE OF TRIAL ON THE GROUNDS IT IS NOT WITHIN THE TIME LIMITS PRESCRIBED BY CrR 3.3, WITHIN TEN (10) DAYS OF THE DATE ON WHICH TRIAL IS SET, WILL WAIVE ANY OBJECTION THAT THE TRIAL DATE IS IN VIOLATION OF CrR 3.3.

FAILURE TO OBJECT AT THE TIME OF ARRAIGNMENT TO THE DATE OF ARRAIGNMENT SET IN THIS CASE ON THE GROUNDS THAT IT IS NOT WITHIN THE LIMITS PRESCRIBED BY CrR 4.1(a), WILL WAIVE ANY OBJECTION THAT THE ARRAIGNMENT DATE IS IN VIOLATION OF CrR 4.1.

DATED: 6/29/10

JUDGE/~~COURT COMMISSIONER/SCHEDULER~~

Original - Court File
cc: Green - Court Scheduler
Yellow - Defendant
Pink - Defense Attorney: ☐ Crawford ☐ Case ☐ Hunko ☐ Ness ☐ Rovang ☐ Other: _____

Briefs Due: State-_____; Defense-_____; Reply-_____

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RECEIVED AND FILED
IN OPEN COURT
NOV 0 1 2010
DAVID W. PETERSON
KITSAP COUNTY CLERK

IN THE KITSAP COUNTY SUPERIOR COURT

STATE OF WASHINGTON,

Plaintiff,

v.

ANTHONY JAMES REEK,
Age: 41; DOB: 11/08/1968,

Defendant.

No. 09-1-01134-4

FOURTH AMENDED INFORMATION

(Total Counts Filed – 11)

COMES NOW the Plaintiff, STATE OF WASHINGTON, by and through its attorney, BARBARA O. DENNIS, WSBA NO. 34590, Deputy Prosecuting Attorney, and hereby alleges that contrary to the form, force and effect of the ordinances and/or statutes in such cases made and provided, and against the peace and dignity of the STATE OF WASHINGTON, the above-named Defendant did commit the following offense(s)–

Count I
Burglary in the Second Degree

On or about August 17, 2009, in the County of Kitsap, State of Washington, the above-named Defendant, with intent to commit a crime against a person or property therein, entered or remained unlawfully in a building; contrary to the Revised Code of Washington 9A.52.030(1).

(MAXIMUM PENALTY–Ten (10) years imprisonment and/or a $20,000.00 fine pursuant to RCW 9A.52.030(2) and RCW 9A.20.021(1)(b), plus restitution and assessments.)

JIS Code: 9A.52.030 Burglary – 2 Degree

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Special Allegation–Aggravating Circumstance–Multiple Current Offenses; Some Unpunished

AND FURTHERMORE, the Defendant has committed multiple current offenses and the Defendant's high offender score results in some of the current offenses going unpunished, contrary to RCW 9.94A.535(2)(c) [determination by judge].

Count II
Burglary in the Second Degree

On or about August 17, 2009, in the County of Kitsap, State of Washington, the above-named Defendant, with intent to commit a crime against a person or property therein, entered or remained unlawfully in a building; contrary to the Revised Code of Washington 9A.52.030(1).

(MAXIMUM PENALTY–Ten (10) years imprisonment and/or a $20,000.00 fine pursuant to RCW 9A.52.030(2) and RCW 9A.20.021(1)(b), plus restitution and assessments.)

JIS Code: 9A.52.030 Burglary – 2 Degree

Special Allegation–Aggravating Circumstance–Multiple Current Offenses; Some Unpunished

AND FURTHERMORE, the Defendant has committed multiple current offenses and the Defendant's high offender score results in some of the current offenses going unpunished, contrary to RCW 9.94A.535(2)(c) [determination by judge].

Count III
Forgery

On or about August 17, 2009, in the County of Kitsap, State of Washington, the above-named Defendant, with intent to injure or defraud, did falsely make, complete or alter a written instrument, and/or did possess, utter, offer, dispose of, or put off as true a written instrument which Defendant knew to be forged, to-wit: Forged ID card; contrary to the Revised Code of Washington 9A.60.020(1).

(MAXIMUM PENALTY–Five (5) years imprisonment and/or a $10,000 fine pursuant to RCW 9A.60.020(2) and RCW 9A.20.021(1)(c), plus restitution and assessments.)

JIS Code: 9A.60.020.1 Forgery

Special Allegation–Aggravating Circumstance–Multiple Current Offenses; Some Unpunished

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AND FURTHERMORE, the Defendant has committed multiple current offenses and the Defendant's high offender score results in some of the current offenses going unpunished, contrary to RCW 9.94A.535(2)(c) [determination by judge].

Count IV
Forgery

On or about August 17, 2009, in the County of Kitsap, State of Washington, the above-named Defendant, with intent to injure or defraud, did falsely make, complete or alter a written instrument, and/or did possess, utter, offer, dispose of, or put off as true a written instrument which Defendant knew to be forged, to-wit: Forged ID card; contrary to the Revised Code of Washington 9A.60.020(1).

(MAXIMUM PENALTY–Five (5) years imprisonment and/or a $10,000 fine pursuant to RCW 9A.60.020(2) and RCW 9A.20.021(1)(c), plus restitution and assessments.)

JIS Code: 9A.60.020.1 Forgery

Special Allegation–Aggravating Circumstance–Multiple Current Offenses; Some Unpunished

AND FURTHERMORE, the Defendant has committed multiple current offenses and the Defendant's high offender score results in some of the current offenses going unpunished, contrary to RCW 9.94A.535(2)(c) [determination by judge].

Count V
Bail Jumping

On or about November 6, 2009, in the County of Kitsap, State of Washington, the above-named Defendant, having been released by court order or admitted to bail with knowledge of the requirement of a subsequent personal appearance before a court of this state or of the requirement to report to a correctional facility for service of sentence, did fail to appear or did fail to surrender for service of sentence in which a Class B or Class C felony has been filed, to-wit: Kitsap County Superior Court Cause No. 09-1-01134-4; contrary to Revised Code of Washington 9A.76.170.

(MAXIMUM PENALTY (Failure to appear in Class B or Class C felony case)–Five (5) years imprisonment and/or a $10,000 fine pursuant to RCW 9A.76.170 and RCW 9A.20.021(1)(c), plus restitution and assessments.)

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for service of sentence in which a Class B or Class C felony has been filed, to-wit: Kitsap County Superior Court Cause No. 09-1-01134-4; contrary to Revised Code of Washington 9A.76.170.

(MAXIMUM PENALTY (Failure to appear in Class B or Class C felony case)–Five (5) years imprisonment and/or a $10,000 fine pursuant to RCW 9A.76.170 and RCW 9A.20.021(1)(c), plus restitution and assessments.)

JIS Code: 9A.76.170.3C Bail Jumping-Felony B or C

Special Allegation–Aggravating Circumstance–Multiple Current Offenses; Some Unpunished

AND FURTHERMORE, the Defendant has committed multiple current offenses and the Defendant's high offender score results in some of the current offenses going unpunished, contrary to RCW 9.94A.535(2)(c) [determination by judge].

Count VIII

Making a False or Misleading Statement to a Public Servant

On or about August 17, 2009, in the County of Kitsap, State of Washington, the above-named Defendant did knowingly make a false or misleading material statement to a public servant; contrary to Revised Code of Washington 9A.76.175.

(MAXIMUM PENALTY-One (1) year in jail or $5,000 fine, or both, pursuant to RCW 9A.76.175, as codified by Laws of 2001, Chapter 308, Section 2, and RCW 9A.20.021(2), plus restitution, assessments and court costs.)

JIS Code: 9A.76.175 Make False Sttment to Pub Servant

Count IX

Making a False or Misleading Statement to a Public Servant

On or about May 10, 2010, in the County of Kitsap, State of Washington, the above-named Defendant did knowingly make a false or misleading material statement to a public servant; contrary to Revised Code of Washington 9A.76.175.

(MAXIMUM PENALTY-One (1) year in jail or $5,000 fine, or both, pursuant to RCW 9A.76.175, as codified by Laws of 2001, Chapter 308, Section 2, and RCW 9A.20.021(2), plus restitution, assessments and court costs.)

JIS Code: 9A.76.175 Make False Sttment to Pub Servant

Count X

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Criminal Trespass in the First Degree

On or about August 5, 2009, in the County of Kitsap, State of Washington, the above-named Defendant did knowingly enter or remain unlawfully in a building; contrary to Revised Code of Washington 9A.52.070(1).

(MAXIMUM PENALTY-One (1) year in jail or $5,000 fine, or both, pursuant to RCW 9A.52.070 and RCW 9A.20.021(2), plus restitution, assessments and court costs.)

JIS Code: 9A.52.070 Criminal Trespass-1st Degree

Count XI
Criminal Trespass in the First Degree

On or about August 13, 2009, in the County of Kitsap, State of Washington, the above-named Defendant did knowingly enter or remain unlawfully in a building; contrary to Revised Code of Washington 9A.52.070(1).

(MAXIMUM PENALTY-One (1) year in jail or $5,000 fine, or both, pursuant to RCW 9A.52.070 and RCW 9A.20.021(2), plus restitution, assessments and court costs.)

JIS Code: 9A.52.070 Criminal Trespass-1st Degree

I certify (or declare) under penalty of perjury under the laws of the State of Washington that I have probable cause to believe that the above-named Defendant committed the above offense(s), and that the foregoing is true and correct to the best of my knowledge, information and belief.

DATED: October 29, 2010
PLACE: Port Orchard, WA

STATE OF WASHINGTON

BARBARA O. DENNIS, WSBA NO. 34590
Deputy Prosecuting Attorney

All suspects associated with this incident are–

Anthony James Reek
Sheila Kaye Perkins

Russell D. Hauge, Prosecuting Attorney
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DEFENDANT IDENTIFICATION INFORMATION

ANTHONY JAMES REEK	Alias Name(s), Date(s) of Birth, and SS Number
40 Dryke	Anthony Nmi Reek, 11/08/1968
Sequim, Wa 98382	Brian J. Reek, 11/08/1968

[Address source–(1) Kitsap County Jail records if Defendant in custody, or law enforcement report noted below if Defendant not in custody, or (2) Washington Department of Licensing abstract of driving record if no other address information available]

Race: White	Sex: Male	DOB: 11/08/1968	Age: 41
D/L: P116085007	D/L State: Missouri	SID: WA23270676	Height: 507
Weight: 152	JUVIS: Unknown	Eyes: Brown	Hair: Brown
DOC: Unknown	FBI: 47914EC2		

LAW ENFORCEMENT INFORMATION

Incident Location: 21200 Olhava Way Nw, Poulsbo, WA 98370

Law Enforcement Report No.: 2009PP001041

Law Enforcement Filing Officer: Nick E. Hoke, 610

Law Enforcement Agency: Poulsbo Police Department - WA0180500

Court: Kitsap County Superior Court, WA018015J

Motor Vehicle Involved? No

Domestic Violence Charge(s)? No

Law Enforcement Bail Amount? unknown

CLERK ACTION REQUIRED

No Action Required

Appearance Date If Applicable: n/a

PROSECUTOR DISTRIBUTION INFORMATION

Superior Court	District & Municipal Court
Original Charging Document– Original +2 copies to Clerk 1 copy to file **Amended Charging Document(s)–** Original +2 copies to Clerk 1 copy to file	**Original Charging Document–** Original +1 copy to Clerk 1 copy to file **Amended Charging Document(s)–** Original +1 copy clipped inside file on top of left side 1 copy to file

Prosecutor's File Number–09-188610-2

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JIS Code: 9A.76.170.3C Bail Jumping-Felony B or C

Special Allegation–Aggravating Circumstance–Multiple Current Offenses; Some Unpunished

AND FURTHERMORE, the Defendant has committed multiple current offenses and the Defendant's high offender score results in some of the current offenses going unpunished, contrary to RCW 9.94A.535(2)(c) [determination by judge].

Count VI
Bail Jumping

On or about July 13, 2010, in the County of Kitsap, State of Washington, the above-named Defendant, having been released by court order or admitted to bail with knowledge of the requirement of a subsequent personal appearance before a court of this state or of the requirement to report to a correctional facility for service of sentence, did fail to appear or did fail to surrender for service of sentence in which a Class B or Class C felony has been filed, to-wit: Kitsap County Superior Court Cause No. 09-1-01134-4; contrary to Revised Code of Washington 9A.76.170.

(MAXIMUM PENALTY (Failure to appear in Class B or Class C felony case)–Five (5) years imprisonment and/or a $10,000 fine pursuant to RCW 9A.76.170 and RCW 9A.20.021(1)(c), plus restitution and assessments.)

JIS Code: 9A.76.170.3C Bail Jumping-Felony B or C

Special Allegation–Aggravating Circumstance–Multiple Current Offenses; Some Unpunished

AND FURTHERMORE, the Defendant has committed multiple current offenses and the Defendant's high offender score results in some of the current offenses going unpunished, contrary to RCW 9.94A.535(2)(c) [determination by judge].

Count VII
Bail Jumping

On or about September 7, 2010, in the County of Kitsap, State of Washington, the above-named Defendant, having been released by court order or admitted to bail with knowledge of the requirement of a subsequent personal appearance before a court of this state or of the requirement to report to a correctional facility for service of sentence, did fail to appear or did fail to surrender

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INSTRUCTION NO. 25

To convict the defendant of the crime of Bail Jumping as charged in count V, each of the following elements of the crime must be proved beyond a reasonable doubt–

(5) That on or about November 6, 2009, the defendant failed to appear before a court;

(6) That the defendant was charged with Burglary in the Second Degree, a class B or C felony;

(7) That the defendant had been released by court order with knowledge of the requirement of a subsequent personal appearance before that court; and

(8) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

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INSTRUCTION NO. 16

To convict the defendant of the crime of Bail Jumping as charged in count VI, each of the following elements of the crime must be proved beyond a reasonable doubt–

(1) That on or about July 13, 2010, the defendant failed to appear before a court;

(2) That the defendant was charged with Burglary in the Second Degree, a class B or C felony;

(3) That the defendant had been released by court order with knowledge of the requirement of a subsequent personal appearance before that court; and

(4) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 27

To convict the defendant of the crime of Bail Jumping as charged in count VII, each of the following elements of the crime must be proved beyond a reasonable doubt–

(1) That on or about September 7, 2010, the defendant failed to appear before a court;

(2) That the defendant was charged with Burglary in the Second Degree, a class B or C felony;

(3) That the defendant had been released by court order with knowledge of the requirement of a subsequent personal appearance before that court; and

(4) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

(d) Video Conference Proceedings.

(1) *Authorization.* Preliminary appearances held pursuant to CrR 3.2.1, arraignments held pursuant to this rule and CrR 4.1, bail hearings held pursuant to CrR 3.2, and trial settings held pursuant to CrR 3.3, may be conducted by video conference in which all participants can simultaneously see, hear, and speak with each other. Such proceedings shall be deemed held in open court and in the defendant's presence for the purposes of any statute, court rule or policy. All video conference hearings conducted pursuant to this rule shall be public, and the public shall be able to simultaneously see and hear all participants and speak as permitted by the trial court judge. Any party may request an in person hearing, which may in the trial court judge's discretion be granted.

(2) *Agreement.* Other trial court proceedings including the entry of a Statement of Defendant on Plea of Guilty as provided for by CrR 4.2 may be conducted by video conference only by agreement of the parties, either in writing or on the record, and upon the approval of the trial court judge pursuant to local court rule.

(3) *Standards for Video Conference Proceedings.* The judge, counsel, all parties, and the public must be able to see and hear each other during proceedings, and speak as permitted by the judge. Video conference facilities must provide for confidential communications between attorney and client and security sufficient to protect the safety of all participants and observers. In interpreted proceedings, the interpreter must be located next to the defendant and the proceeding must be conducted to assure that the interpreter can hear all participants.

[Amended effective September 1, 1995; December 28, 1999; April 3, 2001.]

Comment

Supersedes RCW 10.01.080; RCW 10.46.120, .130; RCW 10.64.020, .030.

RULE 3.5 CONFESSION PROCEDURE

(a) Requirement for and Time of Hearing. When a statement of the accused is to be offered in evidence, the judge at the time of the omnibus hearing shall hold or set the time for a hearing, if not previously held, for the purpose of determining whether the statement is admissible. A court reporter or a court approved electronic recording device shall record the evidence adduced at this hearing.

(b) Duty of Court to Inform Defendant. It shall be the duty of the court to inform the defendant that: (1) he may, but need not, testify at the hearing on the circumstances surrounding the statement; (2) if he does testify at the hearing, he will be subject to cross examination with respect to the circumstances surrounding the statement and with respect to his credibility; (3) if he does testify at the hearing, he does not by so testifying waive his right to remain silent during the trial; and (4) if he does testify at the hearing, neither this fact nor his testimony at the hearing shall be mentioned to the jury unless he testifies concerning the statement at trial.

(c) Duty of Court to Make a Record. After the hearing, the court shall set forth in writing: (1) the undisputed facts; (2) the disputed facts; (3) conclusions as to the disputed facts; and (4) conclusion as to whether the statement is admissible and the reasons therefor.

(d) Rights of Defendant When Statement Is Ruled Admissible. If the court rules that the statement is admissible, and it is offered in evidence: (1) the defense may offer evidence or cross-examine the witnesses, with respect to the statement without waiving an objection to the admissibility of the statement; (2) unless the defendant testifies at the trial concerning the statement, no reference shall be made to the fact, if it be so, that the defendant testified at the preliminary hearing on the admissibility of the confession; (3) if the defendant becomes a witness on this issue, he shall be subject to cross examination to the same extent as would any other witness; and, (4) if the defense raises the issue of voluntariness under subsection (1) above, the jury shall be instructed that they may give such weight and credibility to the confession in view of the surrounding circumstances, as they see fit.

RULE 3.6 SUPPRESSION HEARINGS—DUTY OF COURT

(a) Pleadings. Motions to suppress physical, oral or identification evidence, other than motion pursuant to rule 3.5, shall be in writing supported by an affidavit or document setting forth the facts the moving party anticipates will be elicited at a hearing, and a memorandum of authorities in support of the motion. Opposing counsel may be ordered to serve and file a memorandum of authorities in opposition to the motion. The court shall determine whether an evidentiary hearing is required based upon the moving papers. If the court determines that no evidentiary hearing is required, the court shall enter a written order setting forth its reasons.

(b) Hearing. If an evidentiary hearing is conducted, at its conclusion the court shall enter written findings of fact and conclusions of law.

[Adopted effective May 15, 1978; amended effective January 2, 1997.]

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(c) **Effect of Denial of Discretionary Review.** Except with regard to a decision of a superior court entered in a proceeding to review a decision of a court of limited jurisdiction, the denial of discretionary review of a superior court decision does not affect the right of a party to obtain later review of the trial court decision or the issues pertaining to that decision.

(d) **Considerations Governing Acceptance of Review of Superior Court Decision on Review of Decision of Court of Limited Jurisdiction.** Discretionary review of a superior court decision entered in a proceeding to review a decision of a court of limited jurisdiction will be accepted only:

(1) If the decision of the superior court is in conflict with a decision of the Court of Appeals or the Supreme Court; or

(2) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or

(3) If the decision involves an issue of public interest which should be determined by an appellate court; or

(4) If the superior court has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by the court of limited jurisdiction, as to call for review by the appellate court.

(e) **Acceptance of Review.** Upon accepting discretionary review, the appellate court may specify the issue or issues as to which review is granted.

[Amended effective January 1, 1981; September 1, 1985; September 1, 1998; December 24, 2002.]

RULE 2.4 SCOPE OF REVIEW OF A TRIAL COURT DECISION

(a) **Generally.** The appellate court will, at the instance of the appellant, review the decision or parts of the decision designated in the notice of appeal or, subject to RAP 2.3(e), in the notice for discretionary review, and other decisions in the case as provided in sections (b), (c), (d), and (e). The appellate court will, at the instance of the respondent, review those acts in the proceeding below which if repeated on remand would constitute error prejudicial to respondent. The appellate court will grant a respondent affirmative relief by modifying the decision which is the subject matter of the review only (1) if the respondent also seeks review of the decision by the timely filing of a notice of appeal or a notice of discretionary review, or (2) if demanded by the necessities of the case.

(b) **Order or Ruling Not Designated in Notice.** The appellate court will review a trial court order or ruling not designated in the notice, including an appealable order, if (1) the order or ruling prejudicially affects the decision designated in the notice, and (2) the order is entered, or the ruling is made, before the appellate court accepts review. A timely notice of appeal of a trial court decision relating to attorney fees and costs does not bring up for review a decision previously entered in the action that is otherwise appealable under rule 2.2(a) unless a timely notice of appeal has been filed to seek review of the previous decision.

(c) **Final Judgment Not Designated in Notice.** Except as provided in rule 2.4(b), the appellate court will review a final judgment not designated in the notice only if the notice designates an order deciding a timely posttrial motion based on (1) CR 50(b) (judgment as a matter of law), (2) CR 52(b) (amendment of findings), (3) CR 59 (reconsideration, new trial, and amendment of judgments), (4) CrR 7.4 (arrest of judgment), or (5) CrR 7.6 (new trial).

(d) **Order Deciding Alternative Post-trial Motions in Civil Case.** An appeal from the judgment granted on a motion for judgment notwithstanding the verdict brings up for review the ruling of the trial court on a motion for new trial. If the appellate court reverses the judgment notwithstanding the verdict, the appellate court will review the ruling on the motion for a new trial.

(e) **Order Deciding Alternative Post-trial Motions in Criminal Case.** An appeal from an order granting a motion in arrest of judgment brings up for review the ruling of the trial court on a motion for new trial. If the appellate court reverses the order granting the motion in arrest of judgment, the appellate court will review the ruling on a motion for new trial.

(f) **Decisions on Certain Motions Not Designated in Notice.** An appeal from a final judgment brings up for review the ruling of the trial court on an order deciding a timely motion based on (1) CR 50(b) (judgment as a matter of law), (2) CR 52(b) (amendment of findings), (3) CR 59 (reconsideration, new trial, and amendment of judgments), (4) CrR 7.4 (arrest of judgment), or (5) CrR 7.6 (new trial).

(g) **Award of Attorney Fees.** An appeal from a decision on the merits of a case brings up for review an award of attorney fees entered after the appellate court accepts review of the decision on the merits.

[Amended effective September 1, 1994; September 1, 1998; December 24, 2002.]

References

Rule 5.2, Time Allowed To File Notice, (f) Subsequent notice by other parties.

RULE 2.5 CIRCUMSTANCES WHICH MAY AFFECT SCOPE OF REVIEW

(a) **Errors Raised for First Time on Review.** The appellate court may refuse to review any claim of error which was not raised in the trial court. However, a party may raise the following claimed errors for the first time in the appellate court: (1) lack of trial court jurisdiction, (2) failure to establish facts upon which relief can be granted, and (3) manifest error affecting a constitutional right. A party or the court may raise at any time the question of appellate court jurisdiction. A party may present a ground for affirming a trial court decision which was not presented to the trial court if the record has been sufficiently developed to fairly consider

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the ground. A party may raise a claim of error which was not raised by the party in the trial court if another party on the same side of the case has raised the claim of error in the trial court.

(b) **Acceptance of Benefits.**

(1) *Generally.* A party may accept the benefits of a trial court decision without losing the right to obtain review of that decision only (i) if the decision is one which is subject to modification by the court making the decision or (ii) if the party gives security as provided in subsection (b)(2) or (iii) if, regardless of the result of the review based solely on the issues raised by the party accepting benefits, the party will be entitled to at least the benefits of the trial court decision or (iv) if the decision is one which divides property in connection with a dissolution of marriage, a legal separation, a declaration of invalidity of marriage, or the dissolution of a meretricious relationship.

(2) *Security.* If a party gives adequate security to make restitution if the decision is reversed or modified, a party may accept the benefits of the decision without losing the right to obtain review of that decision. A party that would otherwise lose the right to obtain review because of the acceptance of benefits shall be given a reasonable period of time to post security to prevent loss of review. The trial court making the decision shall fix the amount and type of security to be given by the party accepting the benefits.

(3) *Conflict With Statutes.* In the event of any conflict between this section and a statute, the statute governs.

(c) **Law of the Case Doctrine Restricted.** The following provisions apply if the same case is again before the appellate court following a remand:

(1) *Prior Trial Court Action.* If a trial court decision is otherwise properly before the appellate court, the appellate court may at the instance of a party review and determine the propriety of a decision of the trial court even though a similar decision was not disputed in an earlier review of the same case.

(2) *Prior Appellate Court Decision.* The appellate court may at the instance of a party review the propriety of an earlier decision of the appellate court in the same case and, where justice would best be served, decide the case on the basis of the appellate court's opinion of the law at the time of the later review.

[Amended effective September 1, 1985; September 1, 1994.]

TITLE 3. PARTIES

RULE 3.1 WHO MAY SEEK REVIEW

Only an aggrieved party may seek review by the appellate court.

RULE 3.2 SUBSTITUTION OF PARTIES

(a) **Substitution Generally.** The appellate court will substitute parties to a review when it appears that a party is deceased or legally incompetent or that the interest of a party in the subject matter of the review has been transferred.

(b) **Duty to Move for Substitution.** A party with knowledge of the death or declared legal disability of a party to review, or knowledge of the transfer of a party's interest in the subject matter of the review, shall promptly move for substitution of parties. The motion and all other documents must be served on all parties and on the personal representative or successor in interest of a party, within the time and in the manner provided for service on a party. If a party fails to promptly move for substitution, the personal representative of a deceased or legally disabled party, or the successor in interest of a party, should promptly move for substitution of parties.

(c) **Where to Make Motion.** The motion to substitute parties must be made in the appellate court if the motion is made after the notice of appeal was filed or discretionary review was granted. In other cases, the motion should be made in the trial court.

(d) **Procedure Pending Substitution.** A party, a successor in interest of a party, a personal representative of a deceased or legally disabled party, or an attorney of record for a deceased or legally disabled party who has no personal representative, may without waiting for substitution file (1) a notice of appeal, (2) a notice for discretionary review, (3) a motion for reconsideration, (4) a petition for review, and (5) a motion for discretionary review of a decision of a trial court or the Court of Appeals.

(e) **Time Limits.** The time reasonably necessary to accomplish substitution of parties is excluded from computations of time made to determine whether the following have been timely filed: (1) a notice of appeal, (2) a notice for discretionary review, (3) a motion for reconsideration, (4) a petition for review, and (5) a motion for discretionary review of a decision of a trial court or the Court of Appeals.

(f) **Public Officer.** If a public officer is a party to a proceeding in the appellate court and during its pendency dies, resigns, or otherwise ceases to hold office, a party or the new public officer may move for substitution of the successor as provided in this rule.

[Amended effective September 1, 1998.]

RULE 3.3 CONSOLIDATION OF CASES

(a) **Cases Tried Together.** If two or more cases have been tried together or consolidated for trial, the cases are consolidated for the purpose of review unless the appellate court otherwise directs.

(b) **Cases Consolidated in Appellate Court.** The appellate court, on its own initiative or on motion of a party, may order the consolidation of cases or the separation of cases for the purpose of review. A party should move to consolidate two or more cases if

RCW 9A.76.170
Bail jumping.

(1) Any person having been released by court order or admitted to bail with knowledge of the requirement of a subsequent personal appearance before any court of this state, or of the requirement to report to a correctional facility for service of sentence, and who fails to appear or who fails to surrender for service of sentence as required is guilty of bail jumping.

(2) It is an affirmative defense to a prosecution under this section that uncontrollable circumstances prevented the person from appearing or surrendering, and that the person did not contribute to the creation of such circumstances in reckless disregard of the requirement to appear or surrender, and that the person appeared or surrendered as soon as such circumstances ceased to exist.

(3) Bail jumping is:

(a) A class A felony if the person was held for, charged with, or convicted of murder in the first degree;

(b) A class B felony if the person was held for, charged with, or convicted of a class A felony other than murder in the first degree;

(c) A class C felony if the person was held for, charged with, or convicted of a class B or class C felony;

(d) A misdemeanor if the person was held for, charged with, or convicted of a gross misdemeanor or misdemeanor.

[2001 c 264 § 3; 1983 1st ex.s. c 4 § 3; 1975 1st ex.s. c 260 § 9A.76.170.]

Notes:

Effective date -- 2001 c 264: See note following RCW 9A.76.110.

Severability -- 1983 1st ex.s. c 4: See note following RCW 9A.48.070.

H

Escape from Community Custody

Riot (if against property)

1st Degree Theft of Livestock

2nd Degree Theft of Livestock

ALL OTHER UNCLASSIFIED FELONIES

Selection of Charges/Degree of Charge

(i) The prosecutor should file charges which adequately describe the nature of defendant's conduct. Other offenses may be charged only if they are necessary to ensure that the charges:

(A) Will significantly enhance the strength of the state's case at trial; or

(B) Will result in restitution to all victims.

(ii) The prosecutor should not overcharge to obtain a guilty plea. Overcharging includes:

(A) Charging a higher degree;

(B) Charging additional counts.

This standard is intended to direct prosecutors to charge those crimes which demonstrate the nature and seriousness of a defendant's criminal conduct, but to decline to charge crimes which are not necessary to such an indication. Crimes which do not merge as a matter of law, but which arise from the same course of conduct, do not all have to be charged.

(b) GUIDELINES/COMMENTARY:

(i) Police Investigation

A prosecuting attorney is dependent upon law enforcement agencies to conduct the necessary factual investigation which must precede the decision to prosecute. The prosecuting attorney shall ensure that a thorough factual investigation has been conducted before a decision to prosecute is made. In ordinary circumstances the investigation should include the following:

(A) The interviewing of all material witnesses, together with the obtaining of written statements whenever possible;

(B) The completion of necessary laboratory tests; and

(C) The obtaining, in accordance with constitutional requirements, of the suspect's version of the events.

If the initial investigation is incomplete, a prosecuting attorney should insist upon further investigation before a decision to prosecute is made, and specify what the investigation needs to include.

(ii) Exceptions

In certain situations, a prosecuting attorney may authorize filing of a criminal complaint before the investigation is complete if:

(A) Probable cause exists to believe the suspect is guilty; and

(B) The suspect presents a danger to the community or is likely to flee if not apprehended; or

(C) The arrest of the suspect is necessary to complete the investigation of the crime.

In the event that the exception to the standard is applied, the prosecuting attorney shall obtain a commitment from the law enforcement agency involved to complete the investigation in a timely manner. If the subsequent investigation does not produce sufficient evidence to meet the normal charging standard, the complaint should be dismissed.

(iii) Investigation Techniques

The prosecutor should be fully advised of the investigatory techniques that were used in the case investigation including:

(A) Polygraph testing;

AMENDMENT (V)

No person shall be held to held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT (VI)

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

AMENDMENT (XIV)

Ss. 1. Citizenship rights not be abridged by states

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

L

WASHINGTON STATE CONSTITUTION

ARTICLE 1

SEC. 3 Personal Rights. No person shall be deprived of life, liberty, or personal property, without due process of law.

PROOF OF SERVICE

STATE OF WASHINGTON)
COUNTY OF KITSAP)

James L. Reese, III, being first duly sworn on oath, deposes and says:

That he is a citizen of the United States, a resident of the State of Washington, over the age of eighteen years, not a party to the above-entitled action, and competent to be a witness herein.

That on the 25th day of August, 2011, he hand delivered for filing, the original and one (1) copy of Appellant's Brief in State of Washington v. Anthony J. Reek, No. 41630-1-II to the office of David Ponzoha, Clerk, Court of Appeals, Division Two, 950 Broadway, Ste. 300, Tacoma, WA 98402-4454; hand delivered one (1) copy of the same to the office of Kitsap County Prosecuting Attorney,614 Division Street, Port Orchard, WA 98366 and deposited in the mails of the United States of America, postage prepaid, one (1) copy of the same to Appellant at his last known address; Anthony J. Reek, DOC #315606, MSU/B-9-U, Washington State Penitentiary, 1313 North 13th Avenue, Walla Walla, WA 99362.

James L. Reese, III

Signed and Attested to before me this 25th day of August, 2011 by James L. Reese, III.

Julia L. Reese
Notary Public in and for the State of Washington residing at Port Orchard.
My Appointment Expires: 4/04/13